WC 06-210

THIS IS THE ORIGINAL OF 5 SETS

Dear Secretary

This is the original of a Declaratory Ruling Request. The 4 additional copies have also been sent.

We believe Mr. Albert Lewis' department will be resolving these issues via the Declaratory Ruling process.

Winback & Conserve Program, Inc,
One Stop Financial, Inc.
800 Discounts, Inc.
Group Discounts, Inc.

Any questions or issues please contact:

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Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:		
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8., and Related Issues.	)	
	)	
Primary Jurisdiction Referral	)	
from the NJ District Court	)	
	)	
One Stop Financial, Inc.	)	Formerly CCB/CPD 96-20
Group Discounts, Inc.	)	
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
Petitioners	)	
	)	
and	)	
AT&T Corp.	)	
Respondent	)	

REQUEST FOR DECLARATORY RULINGS

Overnight Delivery:
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Secretary
Federal Communications Commission
Office of the Secretary
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Capitol Heights, MD 20743

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September 23rd 2006

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Summary

1) When contract tariff 516 (CT-516) came to market it was only a $4 million commitment that offered 66% discount. Petitioners CSTPII plans provided only a 28% discount despite the fact that petitioners were doing over $90 million in billing. Petitioners requested CT-516 and several other CT's but AT&T refused.

2) Aggregators Tel- Save and PSE also requested CT516 and were also told no by AT&T however they each took legal action against AT&T to obtain CT-516. CT 516 offered the AT&T billing of end-users at 28% discount, then AT&T would pay the plan owners an additional 38% of the bill. CSTPII plans received 28% discount which it ordered AT&T to apply end-users either 15%, 17.5%, 20%, or 23%. The difference between the discount level and the total 28% discount went to the aggregator as a monthly check from AT&T. Tel- Save and PSE began to attract petitioners' end-users with larger discounts and petitioners independent contractors, which were attracted with higher sales commissions. Petitioners therefore had to make a business decision so as not to have its entire customer base totally decimated by PSE and Tel-Save.

3) Other CSTPII aggregators suffered to so petitioners and Combined Companies Inc. (CCI) attempted to combine several remaining CSTPII aggregators to obtain a new CT. The proposed new CT would allow AT&T to not pay as much discount as the 66% under CT516, and the commitment was dozens of times higher than CT 516. Petitioners' end-users were going to get more than the 28% that PSE and Tel-Save's end-users were locked into. Petitioners CT would have brought back customers to it and the higher discount to end-users would also reduce loss of end-users to competitors like MCI and Sprint so petitioners reasoned AT&T would definitely want this instead of petitioners temporarily parking its' traffic on CT-516 at 66%.

4) Petitioners knew in Dec 1994 that it had already made its commitment for the fiscal year and it also had pre June 17th 1994 plans that would allow the plans to be restructured (discontinued without liability in tariff terms- and referred to as an "upgrade" on AT&T's Contracts. Therefore

petitioners had strong reason to believe that AT&T would come to the table and give petitioners an equitable CT. AT&T was aware that the contract between petitioners and PSE mandated that the traffic be returned to petitioners so petitioners could then merge their CSTPII plans with all the traffic into a new CT, once AT&T came to the table. AT&T was delaying petitioners CT request so the traffic only transfer under 2.1.8 was ordered.

5) Traffic transfers under 2.1.8 to CT-516 were becoming so prevalent that AT&T instituted a $50 charge to cover end-user traffic transfers from plan to plan. None of the traffic only transfers that were done ever resulted in the transferor ever transferring shortfall obligations or liabilities. As more and more aggregators sought to transfer traffic only under 2.1.8 and keep their CSTPII plans, AT&T "re-interpreted" section 2.1.8 without ever changing its language. AT&T's position in Jan. 1995 was that 2.1.8 was no longer the way to transfer traffic in bulk. AT&T's position was that to do a "traffic only" transfer, the aggregator had to do an entire plan transfer.

6) Interestingly, AT&T endorsed the FCC's traffic transfer methodology of deleting then adding end-users, as per 3.3.1.Q bullet 4. Why? Instead of signing one AT&T Transfer of Service or Assignment Form (TSA), the aggregator had to re-enroll, with signatures, its entire base of 15,000 end-users, with 3 forms for every end-user. It would take months to this and then months to take the end-users back. AT&T Counsel Charles Fash stated that under section 3.3.1.Q bullet 4 the CSTPII plans shortfall and termination (S&T) obligations did not transfer. AT&T was simply preventing aggregators from easily transferring end-users to CT-516's 66% discount.

7) Petitioners ordered the traffic only transfer under 2.1.8 in Dec. 1994. AT&T claimed it "lost the paper work" and asked to resubmit. Information obtained under the Freedom of Information Act (FOIA) later showed AT&T ran to the FCC before even asking for the resubmit trying to stall and convince the FCC to retroactively enact language changes to 2.1.8 to prevent substantial transfers of traffic only under 2.1.8. AT&T's actions spoke louder than words confirming that AT&T clearly understood the transaction was in accordance with its tariff. Multiple AT&T

counsel then conceded that AT&T lost the Substantial Cause Pleading and AT&T withdrew the tariff changes because if the changes were to go into affect, they would only go in prospectively. AT&T did not want to further substantiate the validity of the traffic only transfer for the District Court which was waiting for the FCC's decision on Transmittal 8179. AT&T replaced Tr. 8179 with 9229 which AT&T's counsel certified to the District Court "would not be determinative" of the traffic transfer at hand because all the changes were also prospective. AT&T counsel Richard Meade asserted to the FCC that the transaction was done in accordance with 2.1.8 but because of the amount of accounts being transferred AT&T opposed it under its fraudulent use statute.

8) However, instead of AT&T following its tariffed remedy of temporarily suspending service, AT&T permanently denied the traffic transfer and also acted out side of 2.1.8's statute of limitations requirement of 15 days.

9) The initial referral to the FCC was whether or not 2.1.8 allowed "traffic only" transfers because AT&T stopped all "traffic only" transfers under 2.1.8 that had routinely been done in the past. Due to 2.1.8's violating that its tariffs must be explicit the FCC missed where within 2.1.8 that it allowed traffic transfers, but ruled that the traffic transfer was not prohibited.

10) The FCC also ruled that AT&T used an illegal fraudulent use remedy and therefore no longer could rely on its fraudulent use sections. The FCC's Declaratory Ruling was vacated due to the FCC's erroneous belief that 2.1.8 did not allow traffic only transfers. The DC Circuit did not vacate based upon the FCC's correct position on illegal remedy.

11) When the FCC Declaratory Ruling was issued AT&T was in real bind before the DC Circuit. AT&T now had to attack the FCC's (delete and add) 3.3.1.Q bullet 4 analogy (which it previously endorsed) by arguing that 2.1.8 was indeed the proper way to transfer traffic only; however at the same time the record clearly showed that petitioners used the very section of the tariff, 2.1.8, which AT&T now endorsed after the FCC ruling. Faced with this dilemma and despite the fact that 2.1.8 only allowed 15 days to question the transfer, AT&T made the focus of

the DC Circuit case about which obligations transfer under 2.1.8., and because of 2.1.8's ambiguity confused the DC Circuit on obligation the issue. AT&T's position in Jan. 1995 was that 2.1.8 was no longer the way to transfer traffic in bulk. AT&T's position was that to do a "traffic only" transfer, the aggregator had to do an entire plan transfer. However when the DC Circuit declared that 2.1.8 allowed traffic only transfers, as well as plan transfers, AT&T's position needed to change again. Incredibly, AT&T now states that section 2.1.8 did allow traffic only transfers as long as S&T obligations transfer leaving the CSTPII plan behind with no obligations. However when AT&T changed its position, due to DC Circuit decision, it again painted itself in a corner since it knew it had absolutely zero evidence to support its new ridiculous position. Despite the fact that AT&T claims it has done tens of thousands of traffic only transfers under 2.1.8 AT&T could not show the District Court one bit of evidence that S&T obligations or liabilities transferred on traffic only transfers. In fact the one traffic only transfer AT&T showed the District Court it showed no S&T obligations or S&T liabilities transferring.

12) In June 2005 AT&T asserted to the District Court that in Jan 1995 S&T obligations were included within 2.1.8's second obligation "minimum payment period." In 2006 when petitioners evidenced the FCC's FOIA notes stating that minimum payment period did not include S&T obligations, AT&T then changed its position again and stated that S&T obligations were not included within minimum payment period. AT&T needed a home for where the S&T obligations supposedly were within section 2.1.8 in Jan 1995, so AT&T then told the District Court that S&T obligations are not listed within 2.1.8. You just have to imagine them being there. The interpretive issue of precisely which obligations transfer on traffic only transfers under 2.1.8 is now before the FCC.

13) After AT&T denied the "traffic only" transfer AT&T inflicted S&T charges on the end-users in June of 1996. The previous FCC Oct 2003 Declaratory Ruling while dealing with 2.1.8 also encompassed the June 1996 penalty infliction upon the CSTPII plans.

14) Despite that undisputed fact that AT&T's tariff remedy for imposing S&T charges (3.3.1.Q bullet 10) limited AT&T to the discounts the end-users were receiving, AT&T used another illegal remedy by far exceeding the limit. This illegal remedy put petitioners out of business.

15) AT&T inflicted the charges despite the issue of when pre June 17th 1994 plans were grandfathered to was still in dispute. A new Declaratory Ruling will focus grandfathering pre June 17th 1994 plans based upon the non disputed fact that the CSTPII plan ends when its 3 year term ends. Not the disputed fact that pre June 17th 1994 plans can never have penalties imposed.

16) The FCC will be asked to look at its Oct 1995 Order with AT&T that mandated for a year period that AT&T would grandfather both 2.1.8 transactions as well as pre June 17th 1994 CSTPII plans. The FCC order obviously went till Oct 1996 whereas AT&T placed S&T charges on the end-users in June of 1996.

17) The FCC will need to interpret whether petitioners request to waive S&T obligations under 2.5.7 applies. Section 2.5.7 allows AT&T customers to waive S&T obligations Due To Circumstances Beyond its Control. The undisputed facts were that AT&T's was simultaneously interpreting that a restructured plan is both new and not new. AT&T's position was that it wanted the restructure to be deemed a new plan so the aggregator could lose pre June 17th 1994 grandfathering classification. However, AT&T's simultaneous position was that restructures were "not new" so as to prevent the aggregators from obtaining AT&T customers, without penalty, that were eon term contracts.

18) The petition within also details AT&T's position that it could refuse to offer its' deeply discounted CT's to customers which qualified for it. AT&T not only wouldn't provide a new CT to petitioners but AT&T also refused to allow petitioners to access CT's that were available to the public within the 90 day window. AT&T explained to the Third Circuit that it was able to discriminate as to which customer it would allow to obtain its CT's. The following evidence clearly shows AT&T's position is complete nonsense. End Summary.

Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:	)
Expedited Declaratory Rulings	)
On the transfer of Traffic Only under AT&T	)
Tariff Section 2.1.8., and Related Issues.	)

I. Background: Precisely Which Obligations Should Have Been Transferred Under Section 2.1.8 of Tariff No. 2 As Well as Any Other Issues Left Open

1) This request for Declaratory Ruling was ordered by Judge William G. Bassler of the NJ District Court. Judge Basslers order requests the FCC to answer this question:

> It is further ordered that plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rules to initiate an administrative proceeding to resolve the issue of precisely which obligations should have been transferred under Section 2.1.8 of Tariff No. 2 **as well as any other issues left open** by the D.C. Circuit's Opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005). [1] (exhibit A)

2) Judge Basslers order gave petitioners latitude to raise all related issues as the order states "as well as any other issues left open". The District Court gave petitioners sole discretion whether to file Declaratory Rulings or Formal Complaints. Based upon the AT&T's position to the District Court and the subsequent District Court decision, the decision was made to use the Declaratory Ruling process. AT&T's position to the District Court was that all the issues were already before the FCC, and of course the issues were already before the FCC as Declaratory Rulings:

> Plaintiffs made the same arguments to the FCC that they are now raising in this Court. Their prior submissions to the agency confirm that the issues they ask this Court to decide are all encompassed within this Court's primary jurisdictional referral. AT&T's May 22nd brief.

[1] The August 1, 2006 date was extended to Oct.1st 2006 by subsequent order of Judge Bassler.

3) To further support petitioners use of the Declaratory Ruling process was AT&T's position before the District Court that all issues were interpretive and that there no disputed facts. AT&T counsel Mr Guerra argued to the District Court:

> Mr. Guerra: First of all, firstly, everything counsel said was in fact a question of **interpretation.** The significance of 3.3(1).(Q), which is -- that is just an argument that one tariff sheds light on all obligations. **It's not a factual dispute.** The suggestion that, that whether they intended transfer, shortfall and termination charges, is a question we have been litigating 11 years because they say they didn't have to transfer that. Transcript pg. 20 line 9.

4) The District Court agreed with AT&T that these were all interpretive issues, not disputed facts thus the Declaratory Ruling process was utilized. In July 2005 petitioners contacted the FCC's General Counsel Austin Schlick regarding a procedural question regarding whether it could define and specifically ask for Declaratory Rulings to make sure the issues were addressed by the FCC. Petitioners related that there were Declaratory Ruling requests made by petitioners in the first go around with the FCC but within the 2003 Declaratory Ruling the FCC stated it was not asked by the Court to answer certain petitioners Declaratory Ruling requests. FCC General Counsel Mr. Schlick explained that petitioners would be able to define whatever issue it wished and to request Declaratory Rulings. Therefore petitioners have identified several interpretive issues where there are no disputed facts for Declaratory Rulings. Attached as page 3 of exhibit A is an email exchange between petitioners' regarding just one of the issues and the FCC General Counsel Schlick confirmed the petitioners could define any issues it desired. Petitioners' are seeking several rulings that relate to the denied traffic transfer. Additionally a Declaratory Ruling is being sought on the infliction of AT&T's alleged shortfall and termination obligations in June of 1996 on the CSTPII plans. The FCC's 2003 Declaratory Ruling did encompass the June 1996 penalty infliction. Additionally, magistrate Ronald Hedges stayed the 1997 Supplemental complaint (dealing with the imposition of shortfall and termination charges in June of 1996) along with the traffic transfer issue treating it as a related issue. Petitioners submitted briefs to the District Court seeking to separate the Jan 1995 traffic transfer issue from the June 1996 S&T

charges infliction on end-users. However Judge Bassler was unwilling to separate the issues. Therefore issues relating to both the Jan 1995 traffic transfer issue and the June 1996 S&T charges infliction must be interpreted.

5) As the FCC is aware this will be the FCC's second Declaratory Ruling on AT&T's tariff section 2.1.8. The first question initiated in the District Court and subsequently referred by the Third Circuit in 1996 was:

> whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.

6) For the FCC's convenience attached here as exhibit B is the FCC 2003 Declaratory Ruling, and exhibit C which is the 2005 DC Circuit Decision. The FCC answered the Third Circuit referral by issuing a Declaratory Ruling Oct 17th 2003 concluding:

> In sum, we conclude that AT&T's tariff did not preclude the movement of end-user traffic from CCI to PSE without the accompanying CSTP II plans. We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus cannot rely upon the fraud sections of its tariff to justify its refusal to move the traffic. Accordingly, we conclude that AT&T's action in refusing to move the traffic was unlawful and violated subsection 203(c) of the Communications Act.

II. Due to 2.1.8 Being Non Explicit, The FCC and DC Circuit Did Not Fully Understand Section 2.1.8.

7) Exhibit B pg. 6 n.46 Section 2.1.8 in Jan 1995 Stated:

> Transfer or Assignment – WATS, including "**ANY**" associated telephone number**(s)**, may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the "new Customer".
> B. The "new Customer" notifies the Company in writing that "**it**" agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within **15 days** of receipt of notification.

> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies.

8) The D.C. Circuit stated at exhibit C pg. 7 line 1:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself.

Both the D.C. Circuit and the FCC did not see on its face where within 2.1.8 it allowed traffic only to transfer because 2.1.8 violated the law by not being explicit. The differentiation is actually in the "any" number(s) of accounts that the new customer accepts. Any can be one, some, or most, without specification, that can be transferred. If 2.1.8 only allowed plan transfers (as the FCC originally believed) the word "any" would have to be changed to ALL and the singular option "Number" would have to be only the plural option: Numbers. "All obligations" pertain to, or as AT&T counsel Mr. Carpenter *infra* states "depends upon, what is selected for transfer". Under 2.1.8 at "B" "the "new" Customer (transferee PSE) notifies the Company" (Company=AT&T), what it has accepted (either selected "traffic only" as the case at issue, or the plan with all traffic) and then yes of course it is obligated for "all the obligations" **BUT, only on that part of the service which the transferee (PSE) accepts!"** Of course, shortfall and termination obligations are not transferred by petitioners/assumed by PSE, because, shortfall and termination obligations are the Transferor (petitioner') Customer's plan obligations as per tariff page 3.3.1.Q bullet 10 exhibit D). S&T obligations never transferred on traffic only transfers. This is why, despite the fact that AT&T states it has done tens of thousands of traffic only transfers under 2.1.8, AT&T can not produce one single piece of evidence showing that its position was ever done in such a manner. No evidence exists!

9) AT&T admitted in its 1996 FCC filing, and the FCC Ruling stated, the plans were not being transferred or terminated. If the D.C. Circuit had seen on its face the differentiation, then it would have easily understood that paragraph "B's all obligations language pertains only to what is accepted and reported by the new customer (PSE) to AT&T. It is actually very simple when it is pointed out. The FCC also looked at section 2.1.8 and it also did not recognize on its face that it allowed traffic only transfers. The FCC looked at 3.3.1.Q bullet 4 of the CSTPII/RVPP general rules (exhibit D) and saw that locations could be deleted from the CSTPII plan and added to PSE's CT516 plan and therefore found that petitioners' 2.1.8 transaction was not prohibited even though the FCC ruling understood petitioners request was under section 2.1.8: FCC Ruling: JA 6:

> We conclude that **section 2.1.8** of AT&T's tariff did not address or govern CCI's and PSE's **request** and that its respective tariffs with CCI and PSE permitted the **movement of traffic** at issue here.

The FCC used 3.3.1.Qbullet 4 in its reasoning as to "how the traffic only could transfer, but used 2.1.8 to determine which obligations transfer.

10) The DC Circuit vacated the FCC Ruling agreeing with petitioners' position that the way to transfer traffic in bulk was using section 2.1.8. AT&T had endorsed the FCC's delete and add traffic movement methodology after Dec. 1994 through to the FCC decision. However after the FCC decision, at the DC Circuit, AT&T needed to attack the delete and add traffic transfer methodology in favor of 2.1.8. The DC Circuit Decision did not vacate the FCC decision in regard to the FCC's correct stance that AT&T used an illegal fraudulent use remedy and therefore could not rely upon its fraudulent use provisions; therefore fraudulent use is now a non issue.

III. All Parties Agree that the Only Two Obligations Listed Within 2.1.8 in Jan 1995 were Transferred

11) AT&T concedes and the record clearly shows that the only two obligations explicitly listed

within section 2.1.8 in Jan 1995 (Indebtedness and Minimum Payment Period) were transferred to PSE. AT&T counsel Richard Meade stated in a February 16, 1995 letter to the FCC's David Nall:

> AT&T is filing "at this particular time" to prevent a transaction that (at the minimum) elevates form over substance in an effort to avoid payment of shortfall charges.

12) Mr. Meade conceded that petitioners followed the correct "form" (i.e. correctly followed procedures of 2.1.8 by transferring indebtedness and minimum payment period), but AT&T also wanted shortfall obligations transferred because of the amount of accounts that were transferred.

13) AT&T also conceded to the Third Circuit, that (indebtedness and minimum payment period were transferred however AT&T again wanted S&T Obligations also transferred:

> In fact, AT&T is not merely at risk for non payment of the usage charges themselves, **which are indeed paid by end users directly to AT&T,** but also for plaintiffs' shortfall and termination charges, which can only be paid by plaintiffs from the revenues they would lose as a result of the transfer.

This not only confirmed that indebtedness and minimum payment period were transferred but it also admitted that the S&T charges could only be paid by the petitioners because plans remained with petitioners.

14) AT&T again acknowledged to the District Court that the only two obligations listed within 2.1.8 in Jan 1995 (indebtedness and minimum payment period) were transferred however AT&T also wanted shortfall and termination obligations. May 25th 2006 Oral page 5 line 20

Mr Guerra: We know shortfall and termination were not transferred.

15) Petitioners agree S&T obligations were not transferred since it was a traffic only transfer, not a plan transfer. In a certification not seen by the FCC nor DC Circuit, CCI's owner Larry G. Shipp certified to the District Court confirming that indebtedness and minimum payment period were transferred; see exhibit E. AT&T then stated to District Court Judge Bassler that AT&T agreed that there was no dispute with Mr. Shipps' statements that all the obligations listed within 2.1.8 were transferred:

> They submit a Certification by CCI's President, Larry G. Shipp, that allegedly "clarifies the nature and type of obligations transferred with the traffic [at issue]." But there was no dispute on this subject.

AT&T is correct there are no disputed facts as to what was done. The only two obligations listed were transferred but AT&T wanted S&T obligations that were not listed and only come into play on plan transfers. It is a strict tariff interpretation.

16) Furthermore, PSE's Vice President Pat Bello, in a certification that neither the FCC nor DC Circuit have ever seen also confirmed that PSE was accepting the account obligations (indebtedness and minimum payment period) under 2.1.8.

> As AT&T's customer of record under Contract Tariff No. 516, PSE is also directly liable to AT&T for the charges incurred for the outbound and 800 usage of AT&T services by PSE's customers, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE." See Exhibit F pg. 2 para 5.

17) Additionally, petitioners' FCC reply comments, in 2003, also confirmed its intent to transfer all obligations listed within 2.1.8 at the time of the Jan 1995 traffic only transfer. See exhibit G:

> The "new customer" assumes all obligations of the former customer at the time of transfer or assignment. These obligations include: (1) all indebtedness for the account numbers specified in the TSA and 2) the unexpired portion of any applicable minimum payment period(s)

18) Additionally the cover page and each of the nine AT&T Transfer of Service Forms (TSA's) which are verbatim section 2.1.8 show that the only two obligations listed within 2.1.8 were agreed for transfer by the parties; see exhibit F pgs. 4-13. Additionally the District Court's non vacated May 1995 Decision is the established law of the case:

> The Inga Companies and CCI **followed the transfer section of the tariff to the letter**, they ought not now be forced to deal with a **unilateral change of the rules by AT&T**.

19) The DC Circuit clearly understood that petitioners transferred all obligations within 2.1.8:

> In a motion submitted after the argument however, the Inga Companies note that the **only obligations** enumerated by Section 2.1.8 are outstanding indebtedness for the service and the unexpired portion of any applicable minimum payment period. (DC Circuit pg. 11, n 2 ex. C)

20) Prior to 1995 AT&T always allowed traffic only transfers under 2.1.8 without S&T

obligations transferring. Only indebtedness and the minimum payment period obligations transferred. AT&T stated in 2005 to the District Court that S&T obligations were included with the second 2.1.8 obligation (minimum payment period), but after the FCC FOIA notes were evidenced by petitioners in 2006 AT&T declared that S&T obligations/liabilities were actually **not** within minimum payment period; AT&T simply got caught in a deliberate misrepresentation trying to con the Court that S&T obligations were buried in 2.1.8.'s minimum payment period.

21) AT&T section 2.1.8 in effect in Jan 1995 also uses the words at B) ["These obligations include,"] and then lists the only two obligations required transferring. The FCC FOIA notes correctly state (exhibit K pg. 23) that if AT&T did not want to limit itself it commonly used the phrase: (including, but not limited to:) as it does in other tariff sections. See here:

> AT&T Tariff Section 2.2.8. Use of AT&T Marks – Unless otherwise allowed pursuant to Section 2.2.5, preceding, when WATS is resold, neither the Customer nor any other reseller or intermediary in the sales chain between the Customer and an end user may make any use, **including, but not limited to** use in advertising, promotional materials, Internet…"

22) Therefore, in Jan. 1995 when AT&T used only the words: "These obligations include:" AT&T knew it was limiting itself to just those obligations subsequently indicated. AT&T has conceded that S&T obligations were not within minimum payment period and the two obligations listed was an list exhaustive list. AT&T pulls out of 2.1.8 the phrase "all obligations" and takes it totally out of context. AT&T is misleading what 2.1.8 says by putting the cart before the horse. Section 2.1.8 **DOES NOT SAY: "includes: all obligations."** as AT&T wants everyone to believe. Section 2.1.8 says:

> [The "new Customer" notifies the Company in writing that **it** agrees to assume all obligations of the former Customer at the time of transfer or assignment. **These obligations include**:]
>
> then explicitly lists the only two obligations. AT&T reverses the order to mislead. S&T obligations never transferred on traffic only transfers. This is why, despite the fact that AT&T states it has done tens of thousands of traffic only transfers under 2.1.8; AT&T can

not produce one single piece of evidence showing that its position was ever done in such a manner. No evidence exists!

IV. In Jan 1995 AT&T's Position Was that 2.1.8 No Longer Allowed Traffic Only Transfers

23) **Example One AT&T Counsel Charles Fash:** Never seen by the FCC, nor the DC Circuit is a July 7th 1995 letter from AT&T's counsel Mr. Fash to petitioners counsel Mr. Helein; here as exhibit H.

> I will address the "partial TSA" issue first in general and then with your clients express and announced intentions. The Transfer of Service provision of the tariff addresses the issue of transfer of service, not transfer of traffic by moving individual locations from one plan to another. The proper way to move traffic (i.e. a subset of locations on a plan) between plans is to submit service orders to delete the locations from one plan and add the locations to another.

This became AT&T's position after Dec. 1994 through the FCC's 2003 Decision to prevent aggregators from using 2.1.8.

24) Mr. Fash misrepresented that service was somehow different than traffic just so the aggregator would not use 2.1.8. DC Circuit Decision correctly stated at exhibit C pg. 10, para. 2-- that traffic is service:

> In absence of any contrary evidence we find that "traffic" is a type of service covered by the tariff.

25) Further confirmation of AT&T's knowledge as to whether S&T obligations transfer on traffic only transfers is evidenced by the fact that whether the AT&T endorsed (prior to the FCC decision) 3.3.1.Q bullet 4 "delete and add" position was used, or the AT&T's endorsed 2.1.8 position to the DC Circuit (after the FCC decision); neither tariff section would result in shortfall and termination obligations/liabilities being transferred to the new transferee as the tariff mandates at 3.3.1.Q bullet 10 that S&T obligations must stay with the customer plan.

26) **Example Two: AT&T senior manager Joyce Suek:** On 6/20/1995 stated:

> Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally **we "no longer" process partial TSA's, the TSA must be for the whole plan.**

Joyce Suek" (See exhibit I)

"Partial TSA's" meant traffic only transfers using the Transfer of Service Agreement (TSA). After Dec 1994 through the DC Circuit Decision, AT&T's position, as AT&T's Joyce Suek stated was that the only way to transfer traffic under 2.1.8 was to transfer the entire plan. This same erroneous AT&T logic in Jan 1995 was harshly criticized by the DC Circuit. The FCC also had erroneously believed that to transfer traffic only under 2.1.8 the plan would have to transfer. When the DC Circuit recognized that 2.1.8 allowed both traffic only and plan transfers AT&T then needed to change its position to an even more absurd position. AT&T had to then take the position that 2.1.8 allows traffic only transfers as well as plan transfers but S&T obligations have to also transfer on traffic only transfers, and this would mean that the transferors CSTPII plan stays with petitioners with no obligations on it. Obviously AT&T can't produce one example of its new "post DC Circuit position" because the tariff doesn't even allow for such a transaction.

27) **Example Three: Attorney Colleen Boothby:** In 1995 attorney Colleen Boothby sent letters to the FCC stating AT&T completely stopped traffic only transfers under 2.1.8 and was already imposing Tr. 8179 despite the fact that Tr. 8179 was denied by the FCC in AT&T's Substantial Cause Pleading. In Jan.1995 AT&T's position was that to transfer traffic the entire plan must transfer. However, see exhibit J AT&T s Transfer or Assignment provision stressing on 2/23/02 that all obligations **"may"** be assumed and the current customer would remain jointly and severally liable. **Not must be assumed!** Exactly, S&T obligations were only transferred on plan transfers, not traffic transfers, and the joint and several liability statement only pertains if the S&T obligations transfer, as in a plan transfer. At the time of the Jan 1995 traffic transfer, up to the time of the FCC decision, AT&T's position was that 2.1.8 does not allow traffic only transfers; it was the whole plan or nothing. Since at the time AT&T position was that 2.1.8 no longer allowed traffic only transfers petitioners were not even in a position to negotiate with

AT&T how many accounts AT&T would allow to transfer under 2.1.8. AT&T was no longer transferring any despite the fact that petitioners' fiscal year commitment was already met.

V. The FCC has Already Decided Three Times S&T Obligations Do Not Transfer

28) I) Substantial Cause Pleading in 1995:

FCC notes obtained under the Freedom of Information Act (FOIA), here as exhibit K, show that AT&T went to the FCC upon petitioners' Jan 1995 traffic transfer and spent weeks proposing several different changes to 2.1.8 that would mandate that when there were a certain amount of accounts transferred, the plan had to be transferred. In any event all these proposals would be grandfathered as each states at the bottom:

> This Section F. applies only with respect to volume or term plans or Contract Tariff subscriptions that were not in effect prior to <<TED>>".

<<TED>> means term end date, so existing plans would be grandfathered.

29) AT&T finally settled on a tariff change and in its substantial cause pleading to the FCC argued for retroactive provisioning of its newly created transmittal 8179, see exhibit L.

Tr. 8179 was specifically designed by AT&T to mandate that when a substantial amount of the traffic was transferred that AT&T treat the transaction as a plan transfer in which S&T obligations transferred; not a traffic transfer in which S&T obligations do not transfer. AT&T was attempting to change the status quo of 2.1.8. So while AT&T's Joyce Suek and Charles Fash were telling petitioners that 2.1.8 did not allow for traffic only transfers, AT&T was acknowledging with the FCC that 2.1.8 did in fact allow traffic only transfers and AT&T was seeking to retroactively prohibit large traffic only transfers.

30) The (FOIA) notes show the FCC's position was that AT&T's retroactive argument was nonsense:

> Finally, SC says AT&T should not have to grandfather existing customers as it gets different admin rules based on only when entered into the term plans and that developing and implementing such rules would create needless regulatory complexities with attendant costs and delay. But this does not make sense. (See exhibit M)

31) AT&T's filing of Tr. 8179 shows AT&T attempted to change the status quo of 2.1.8, to mandate that substantial traffic transfers would require the plan and its revenue commitments (i.e. shortfall and termination obligations) to be transferred; whereas normally S&T obligations do not transfer.

32) The tariff does not even permit S&T obligations to transfer away from the transferors CSTPII/RVPP plans on a traffic only transfer, which is why under proposed tariff change Tr. 8179 that was not even an option proposed by AT&T. There are only options: Entire plan transfers or traffic only transfers. If in Jan.1995, when proposing Tr. 8179, AT&T had actually believed the same as its post DC Circuit 2005 position (that traffic transfers with S&T obligations and the CSTPII plan remains with no obligations,) then AT&T would have obviously proposed that scenario as an option in 1995. AT&T's filing of Tr. 8179 shows it acknowledged that 2.1.8 allows both traffic only as well as plan transfers and S&T obligations/liabilities stayed with the plan.

First Time FCC Takes Position:

AT&T Conceded that it Lost its Substantial Cause Pleading to Retroactively Change Section 2.1.8 When It Introduced Tr. 8179

33) Neither the FCC nor the DC Circuit have seen AT&T Counsel Richard Meades' certification conceding that AT&T lost its Substantial Cause hearing to retroactively change the tariff as the FCC determined that traffic only transfers do not require S&T obligations to transfer.

Richard Meade certified to the District Court.

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a broader effect than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and **so would constitute a "substantive tariff change".** (Exhibit N page 4 para 9)

Yes in deed the FCC advised AT&T that it was a substantive tariff change and as such would not be retroactively provisioned.

34) Additionally, neither the FCC nor DC Circuit have seen yet another concession from AT&T counsel Mr. Carpenter. Mr Carpenter admits that AT&T had been told by the FCC during AT&T's Substantial Cause Pleading that mandating that substantial traffic transfers be treated as plan transfers where S&T obligations must transfer would be a substantial tariff change to 2.1.8. Third Circuit Oral Pg 43 here as exhibit O.

> AT&T's Counsel David Carpenter: The FCC asked us to withdraw the complaint because the FCC thought we had done **more in the tariff language than codify** what the tariff already meant because it went beyond prohibiting these sorts of transfers of plans that would affect transfers of individual locations.

35) AT&T did eventually make substantial language changes to 2.1.8 in November of 1995, here as exhibit P. The prospective language changes to 2.1.8 (as per Federal Composition of Tariff Law, are indicated by the letter "C" for Change; as opposed to the letter "T" for text changes with no change in rate or regulation, see exhibit Q. The Federal Composition of Tariff Law exhibit was not seen by the FCC nor the DC Circuit. AT&T submitted it as a prospective change.

36) AT&T withdrew Transmittal 8179 and replaced it with Transmittal 9229 explaining how in the future AT&T would address the traffic transfer at hand. AT&T Counsel Meade certified:

> On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the CCI-PSE transfer--- the segregation of assets (locations) from liabilities (plan commitments) --- in the following manner. See exhibit N pg.7 para 15.

37) AT&T Counsel certified to the District Court that Tr. 9229 prospectively added deposit requirements and therefore there was nothing within Tr. 9229 that would be determinative of the issue presented on the CCI/PSE transfer.

> The Deposit for Shortfall Charges included in Transmittal No. 9229 is a "new concept" that meets AT&T's business concern more directly, without addressing the question of intent. Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer. (Exhibit N pg.7 para 16)

38) Of course the FCC 2003 Ruling also noted at exhibit B page 11 para14:

> We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern resolution of this matter.

Exhibit R are petitions from the National Telecom Resellers Association (which represented hundreds of aggregators), CCI, PSE, The Furst Group, and petitioners' which filed petitions to reject, and defeated AT&T's request to add retroactively provision Tr. 8179 and add language to 2.1.8 on a retroactive basis. These petitions to reject were not seen by the D.C. Circuit nor were they a part of the Joint Appendix before the FCC in its 2003 Declaratory Ruling. The filings clearly indicate that S&T obligations never transferred on traffic only transfers under 2.1.8. and detailed many legitimate business reasons why substantial traffic could be transferred without any reason to suspect fraudulent use.

39) The focus was placed on the percentage of accounts that were transferred and the FCC still rejected AT&T's attempt to retroactively enact 8179 so AT&T withdrew Tr. 8179 so as not to further substantiate petitioners' transaction to the District Court which was waiting for a decision from the FCC on Tr 8179. Additionally, AT&T's tariff shows no cap as to how many or what percentage of accounts could be transferred. Also, a tariffed promo waived the $50 fee per account transferred on the first 500 accounts per each of petitioners 9 plans (4,500 accounts) before paying for the balance. Exhibits at S.

Second Time FCC Takes Position:

The FCC Declaratory Ruling Again Decides that S&T Obligations Do Not Transfer

40) The following FCC quote shows that AT&T admits termination obligations are not an issue; obviously because the termination obligations are tied to the CSTPII/RVPP plans and these CSTPII/RVPP plans were not being terminated. The FCC is quoting AT&T and the FCC understood that termination obligations were no issue. Exhibit B at pg 8. n.56

> Although AT&T also argues that the move also avoided the payment of tariffed termination charges, id., it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) **is not at issue here.** Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

41) The FCC has already agreed with the District Court, that shortfall obligations do not transfer:

FCC Declaratory Ruling exhibit B pg 8 -9 para 11

> Further, CCI (as well as the Inga companies) but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans (Also *See First District Court Opinion* at 9.)

42) More clarification: FCC Declaratory Ruling exhibit B & pg 7 n.51

> (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments.

43) The FCC took the same position as the District Court, which also utilized section 2.1.8's obligations language to interpret and determine which obligations transfer on traffic only transfers. The fact that the Inga Companies were still jointly and severally liable is conclusive that 2.1.8's obligation language was used. The FCC's delete and add accounts analogy under 3.3.1.Q bullet 4 exhibit D, does not even have the joint and several liability provisions in it; so the FCC was clearly using 2.1.8's obligation language to decide which obligations transfer, even though the FCC used 3.3.1.Q bullet 4 (delete and add) to state "how" the traffic could transfer.

Third Time FCC Takes Position:

The FCC's Brief to the DC Circuit Explained in Detail that S&T Obligations & Liabilities Do Not Transfer

44) Although the FCC believed that "traffic only" could not be transferred under 2.1.8 the FCC used 2.1.8 to determine which obligations transfer on traffic only transfers. It is abundantly clear that the FCC interpreted 2.1.8 so as not to require a transfer of the S&T obligations on a traffic only transfer. Here as exhibit T on page 19 and 20 is the FCC's correct position:

> More fundamentally, however, AT&T's argument collapses, because it incorrectly presumes that, apart from the transferee's assumption of liabilities (which occurs under a transfer of plans, but not a transfer of traffic), a transfer of traffic and a transfer of plans yields identical benefits and burdens to AT&T and its customers. That is not the case...
>
> **********

...Thus, each method of structuring the transaction presents distinct benefits and obligations for both AT&T and the customer, and the Commission's reading gives meaning to section 2.1.8.

45) It is clear that the FCC's statement "gives meaning to section 2.1.8" was because the FCC believed the only use for 2.1.8 was due to its obligations language; otherwise 2.1.8 would have no meaning at all since the FCC erroneously believed that the only way traffic only could transferred was under 3.3.1.Q bullet 4 (delete and add).

46) Indeed, elsewhere in its brief, the FCC specifically states that it interpreted 2.1.8 in rejecting AT&T's position that S&T obligations transfer: Here again on page 10 within exhibit T is the FCC's correct position:

In arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customers liability. Id. at para. 9 (JA 6-8) The Commission stressed, however, that even with the transfer of traffic, CCI still would have to meet its tariffed commitments..

47) And, once again, the FCC confirms that S&T obligations remain with petitioners' plans. Here again within exhibit T on page 11 again is the FCC's correct position:

The commission concluded that CCI's obligations remained under the CSTPII and RVPP plans, and that "AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

48) The DC Circuit was never provided with several substantial benefits that the plans had while temporarily having a few accounts. Traffic fluctuates; the CSTII plan is the perpetual asset. The plan was the goose that laid the golden eggs. AT&T's statement that substantially all the "benefits" (i.e. end-user accounts) were being transferred away from petitioners' plans is gross misrepresentation of the income flow. Petitioners would have received incredibly higher revenue from temporarily parking the accounts. The substantially enhanced income flow to the existing CSTPII plan holders was the benefit that was not being transferred. This substantially enhanced